UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY,	:	
Employer,	:	Case No. 13-RC-121359
-and-	:	
COLLEGE ATHLETES PLAYERS ASSOCIATION (CAPA),	:	
Petitioner.	:	

BRIEF OF AMICUS CURIAE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION IN SUPPORT OF NORTHWESTERN UNIVERSITY

LITTLER MENDELSON, P.C.

Donald S. Prophete
Walter C. Hunter
JP Kernisan
Amber Hodgson
1201 Walnut Street
Suite 1450
Kansas City, MO 64106
816.627.4400

Attorneys for *Amicus Curiae*

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF AMICUS CURIAE

The National Collegiate Athletic Association ("NCAA") submits this brief because the outcome of this case could have a significant and irreversible, negative impact on the future of intercollegiate athletics and higher education in the United States.

The National Collegiate Athletic Association is a membership-driven organization of over 1,100 colleges, universities, athletic conferences and other affiliated organizations across the country dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life. The member schools of the NCAA develop the legislation and policies that govern the Association.

In its Constitution, the members of the NCAA have made it clear that "a basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program, and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." Section 1.3.1 NCAA Constitution.

The Supreme Court has recognized that maintaining that line of demarcation is critical. As Justice Stevens said in *NCAA v. Board of Regents of the University of Oklahoma*:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics... [T]he role of the NCAA must be to preserve a tradition that might otherwise die.

468 U.S. 85, 120 (1984).

The Regional Director's decision that Northwestern football scholarship student-athletes are employees threatens the clear purposes of the Association as enacted by its members and is contrary to rulings of the United States Supreme Court and other federal and state courts upholding the NCAA and its member institutions' right to design rules to maintain these

purposes. Declaring scholarship student-athletes to be employees would have many far-reaching destructive consequences. It would:

- marginalize the importance of educational programs;
- isolate rather than integrate student-athletes as a fundamental part of the student body;
- undercut the demarcation between intercollegiate athletics and professional sports;
- undermine the revered tradition of amateurism that colleges and universities have worked tirelessly to preserve for the benefit of students in America;
- fundamentally alter the developmental and educational opportunities provided by college athletics; and
- usurp the responsibilities entrusted to our academic leaders to determine what priority and role athletics should play in the educational development of the college students placed in their care.

Affirming the Regional Director's decision would negatively impact all football players at Northwestern, the hundreds of student-athletes at Northwestern who are not football players, and potentially the millions of present and future student-athletes in all sports across America.

There is absolutely no merit to the argument that scholarship student-athletes are employees under the National Labor Relations Act ("The Act" or "NLRA"). For almost 40 years, the National Labor Relations Board ("NLRB") has held that university students in various circumstances are not employees under the Act because their relationship with the university is

primarily educational.[1] Scholarship student-athletes are not merely primarily students, they are exclusively students. They are exclusively students because both of their major activities – academics and athletics – are integral components of a university's educational program.

Maintaining the collegiate model of amateurism is crucial to preserving an environment where participation in sports is properly integrated into the total educational experience and plays an appropriate role in relation to the students' academic development. The Regional Director's decision that scholarship football student-athletes are employees is contrary to the long established educational purpose of maintaining a college sports program and interferes with the ability of university leaders to set educational policy.

INTRODUCTION

NCAA colleges and universities offer thousands of diverse programs to enhance the educational development of all of their students, including those who are athletes. Some of these programs may not be considered purely "academic" in the traditional sense – such as the marching band, theatre productions, student government or other numerous club activities – but they are all integral components of the educational program. The fact that a number of these activities may generate revenue for universities is irrelevant to their participants' designation as students.

The Regional Director's decision concluding that granting a scholarship converts a student-athlete into an employee is flawed and unsupported by history or careful analysis. In his view, football scholarship student-athletes are employees because scholarships constitute remuneration in exchange for "services" which the universities supervise. Over the past several decades, millions of students have received athletics-based aid. This has never previously been

[1] *See, Adelphi University*, 195 NLRB 639 (1972); *Leland Stanford Junior University*, 214 NLRB 621 (1974); *Brown University*, 342 NLRB 483 (2004). The only exception has been the brief four year period following the erroneous decision in *New York University*, 332 NLRB 1205 (2000)("NYU I"), which was overruled by *Brown*.

held to transform them into employees under the Act. There is absolutely no legitimate reason that they should be considered such today.

A fundamental flaw with the Regional Director's decision is that it pits one educational activity (academics) against another educational activity (athletics). Even assuming that the Regional Director's conclusions of fact with respect to time spent dedicated to athletics versus academics were supported by the record evidence (which they were not),[2] this analysis misses the point completely. Academics and athletics are both educational programs.

II. LEGAL ARGUMENT

A. SCHOLARSHIP STUDENT-ATHLETES ARE NOT EMPLOYEES

1. The Board, the Federal Courts, the Supreme Court and Congress have never declared scholarship student-athletes to be employees under the Act.

The common sense understanding by agencies and federal courts alike has always been that, notwithstanding university scholarships, grants and aid, student-athletes are not employees, they are students. In the over 60 years NCAA college students have received athletics scholarships, not one of them has ever been deemed an employee under the NLRA by the Board, the Supreme Court or Congress.

The material facts that led to the Regional Director's decision have existed for many decades – student-athletes receive scholarships to play sports under the direction of a coach, and millions of people pay to watch.[3] It would have been inappropriate to declare those student-athletes to be employees in the 1950's, and it is just as inappropriate today.

---

[2] Of the four former and current football student-athletes who testified at the February hearing, only Kain Colter testified, self-servingly, that Northwestern football student-athletes spend more time on football-related activities than academics. The other three witnesses, John Pace, Doug Bartels and Patrick Ward, testified, without agenda, that football-student athletes spend more time on academics than athletics, both because of existing NCAA rules and of Northwestern's stringent application of those same rules.

[3] The NCAA approved athletic scholarships across the board in the 1950's and millions of people have paid to watch intercollegiate sports for over a hundred years. For example, in 1914, over 70,000 classmates and fans attended the Yale-Harvard game. In 1926, over 110,000 people attended the Army-Navy game at Soldier Field. Michigan has had no fewer than 100,000 students and fans attend every home game for the past 39 years.

Contrary to CAPA's contention, the Regional Director's decision is not an evolutionary application of long standing labor law principles to a new or different group of workers. It is an illogical and tortured application of principles developed for use in an industrial setting to a previously existing class of individuals who have never been covered by the Act since its passage. There is absolutely no indication that Congress intended student athletes to be treated as employees.[4]

Indeed, Congress enacted specific statutory provisions under Title IX that unequivocally establish that college athletics is an educational program or activity for students. Title IX, by its terms, applies only to educational activities or programs.[5] When Congress amended Title IX in 1974 to require the Department of Health, Education, and Welfare ("HEW") to adopt regulations specifically governing intercollegiate athletics, it was declaring that *college sports* is an educational activity or program.[6] If Congress intended scholarship student-athletes to be treated as employees, it would have ordered the EEOC or the OFCCP to draft the regulations.

2. Scholarship student-athletes have not been considered employees for virtually any purpose under state and federal statutes.

The Board's Notice and Invitation to File Briefs asked whether the existing statutory law, case law and regulations regarding employee status of student-athletes should be relevant to the determination of whether student-athletes are 'employees' under the Act. The simple answer is

---

[4] In fact, legislators have expressed their outrage over the Regional Director's decision. As Senator Alexander said on the Senate Floor on April 14, 2014, "[o]ur message to the NCAA and intercollegiate athletes is: We hope they will understand the opinion of one regional director of the National Labor Relations Board is not the opinion of the entire Federal Government. That is the message I would like to deliver." S2363 CONGRESSIONAL RECORD, April 14, 2014.

[5] It states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity* receiving Federal financial assistance." 20 U.S.C. §1681(a) (emphasis added).

[6] Sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. Sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. ("The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.")

yes – the Board should follow the well-reasoned decisions of virtually every agency and court to address the issue that scholarship student-athletes are not employees.

In *Boston Medical Center Corp.* 330 NLRB 152, 163 (1999), the NLRB declared interns to be employees, reasoning in part that interns are treated as employees "almost without exception" by every court and agency to address the issue. Conversely, almost every court and agency to address the issue, in a variety of circumstances, has concluded that scholarship student-athletes are *not* employees. The examples below illustrate the point.

Title VII. In *Kemether v. Pennsylvania Interscholastic Athletics Ass'n*, 15 F. Supp. 2d 740, 759 (E.D. Pa. 1998), Judge Yohn stated, "[n]o federal court has defied common sense by holding student-athletes to be Title VII employees of their schools or an athletic association." *See also Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996) (distinguishing purposes of Title VII and Title IX).

FLSA. In *Marshall v. Regis Educational Corp.*, 666 F.2d 1324, 1328 (10th Cir. 1981), the court ruled that dormitory resident advisors were not employees under the FLSA because they were like student-athletes on financial aid, who also are not considered to be employees. The court said "[t]he mere fact that a college may have derived some economic value from its resident assistant program does not override the educational benefits of the program and is not dispositive of the "employee" issue as contained within the Fair Labor Standards Act."

Compensation for Services. In *Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081 (7th Cir. 1992), the court explained that athletic scholarship benefits should not be considered compensation for services rendered. It stated:

> We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in aid athletic scholarships offered to college players when the value of the scholarship is based on the school's tuition and room and board, not by the supply and demand for players. .... This description of players "selling their services" to NCAA colleges stands in stark contrast to the academic and amateurism requirements of

> the vast majority of college athletic programs that, in compliance with the NCAA rules and regulations, are foreclosed from offering cash compensation or "non-permissible awards, extra benefits, or excessive or improper expenses not authorized by NCAA legislation...."

Id. at 1091-1092. *See also Agnew v. Nat'l Collegiate Athletics Ass'n*, 683 F.3d 328, 338 (7th Cir. 2012) (noting that "student-athletes are not given bachelor's degrees for playing sports, but rather are given the opportunity to fulfill certain requirements that could lead to the bestowal of a bachelor's degree.").

Workers Compensation. In *Rensing v. Indiana State University Board of Trustees*, 444 N.E.2d 1170, 1173 (Ind. 1983), the Supreme Court of Indiana rejected a scholarship student-athlete's workers compensation claim because the athlete was a student and not an employee. The court noted "a fundamental policy of the NCAA, which is stated in its constitution, is that intercollegiate sports are viewed as part of the educational system and are clearly distinguished from the professional sports business." The court provided the following cogent reasoning behind rejecting the student-athlete's claim, which is precisely on point:

> The scholarship benefits he received were not given him in lieu of pay for remuneration for his services in playing football any more than academic scholarship benefits were given to other students for their high scores on tests or class assignments. Rather, in both cases, the students received benefits based upon their past demonstrated ability in various areas to enable them to pursue opportunities for higher education as well as to further progress in their own fields of endeavor.
>
> Scholarships are given to students in a wide range of artistic, academic and athletic areas... The statute would apply to students who ... perform services not integrally connected with the institution's educational program and for which, if the student were not available, the University would have to hire outsiders ... Scholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by the University for their skills in their respective areas.

Id. at 1174.

This same reasoning was used by the Supreme Judicial Court in Massachusetts in

Kavanagh v. Trustees of Boston University, 440 Mass. 195 (Mass. 2003). The court said:

> The fact that a college or university has facilitated a student's ability to attend that institution by providing a scholarship or other financial assistance does not transform the relationship between the academic institution and the student into any form of employment relationship.
> ...
> While scholarships may introduce some element of "payment" into the relationship, scholarships are not wages (citation omitted). Rather, scholarships pay specific forms of expenses that the student would incur in attending school -- tuition, books, room and board -- and thereby provide the student with an education.

Id. at 199-200. *See also State Compensation Ins. Fund v. Industrial Comm'n of Colo.*, 135 Colo. 570, 314 P.2d 288 (1957) (rejecting workers compensation claim, reasoning that a scholarship student-athlete is not "employee"), *Waldrep v. Texas Emplrs. Ins. Assoc.*, 21 S.W.3d 692 (Tex. App. Austin 2000) (rejecting claim to scholarship student-athlete, noting that students in areas such as music, academics, art and athletics also are required to participate in return for aid).

Title IX. Congress enacted Title IX for the purpose of ensuring that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity* receiving Federal financial assistance." 20 U.S.C. §1681. As noted in the first case to refer to the law, *Brenden v. Independent School District 742*, courts have repeatedly found that athletics is a vital and important part of the educational experience. *See generally Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292, 1298 (8th Cir. 1973) ("[d]iscrimination in high school interscholastic athletics constitutes discrimination in education.").

During the initial years after enactment of Title IX, a number of bills were introduced attempting to stop Title IX from what some believed was its potential negative impact on "revenue-producing" sports in collegiate athletics. *See* Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 11–12 (1992). None of these amendments passed. This is significant because Congress' rejection of the attempt

to distinguish "revenue-producing" sports from the remaining collegiate sports again shows that the intent was to ensure student-athletes remained within the protections of Title IX, an *educational* law. Title IX, therefore, is not just a conflicting Congressional scheme. It is a Congressional declaration that student-athletes at our universities are students.

Taxes. Universities do not issue W-2's to their students for the scholarships awarded to them. This has never been held to violate the Internal Revenue Code. Indeed, Section 117 of the Internal Revenue Code provides that "gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization." 26 U.S.C.A. §§117(a), (b)(1). *See also* Rev. Rul. 77-263, 1977-2 CB 47. The Board in *Leland Stanford* found it significant that the payments to the research assistants were tax exempt income." 214 NLRB at 622 (1974); *see also Brown University*, 342 NLRB at 486, 488 (2004); and *Boston Medical*, 330 NLRB 152, 160 (1999) (tax treatment is a critical factor in determining whether individuals are employees). If the Board were to declare that scholarship student-athletes are employees, it would certainly bring into question the long-standing position found in Revenue Ruling 77-263 that the value of an athletic scholarship is not considered taxable to the student. Thus, declaring scholarship student-athletes at Northwestern University to be employees could result in enormous negative financial consequences for those individuals, as well as potentially millions of scholarship student-athletes in the future.

These court decisions, all of which reject claims that scholarship student-athletes are employees, are important for a number of reasons. First, the reasoning is cogent and absolutely applicable to the NLRA. Second, it demonstrates that a Board ruling that scholarship student-athletes are employees will create chaos through conflict with other statutory schemes, such as the current non-taxable nature of scholarships. Third, as the Board noted in *Boston Medical*, when all other courts and agencies treat particular individuals in a certain manner, the NLRB

should not be an outlier. *See* 330 NLRB 152 (1999). The purposes of the statutes are not identical to the NLRA, but the reasoning articulated in these court decisions is directly on point.

3. The Board should reject application of the "right of control" test and continue to apply the "primarily educational" test articulated in *Brown University.*

The Board's Notice and Invitation to File Briefs asked what test should be applied to determine whether grant-in-aid scholarship football players are employees under the Act, what the proper result should be in applying the test, and whether *Brown* should be adhered to, modified or overruled. The Board should reject the Regional Director's application of the right of control test and continue to apply the "primarily educational" test used in *Brown and Leland Stanford.*

a. The Regional Director's wooden application of the "right of control" test was misplaced and violated the Supreme Court's warning that principles developed for use in the industrial setting cannot be imposed blindly on the academic world.

The Regional Director's wooden application of the "right of control" test to support a finding that student-athletes are employees was completely misplaced. That test was designed to determine whether an entity exercises so little control that an individual should be deemed to be an independent contractor rather than an employee. Here, the controls go beyond those that are typically exercised by employers; they are the controls unique to a university/student relationship.

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court warned that the "principles developed for use in the industrial setting cannot be imposed blindly on the academic world." 444 U.S. at 680–681 (1980), citing *Syracuse University*, 204 NLRB 641, 643 (1973). Applying a right of control test in the educational context would entirely misconstrue the nature and purpose of the control generally exercised over students and student-athletes by their institutions. *See Brown*, 342 NLRB at 488. At institutions of higher education, the nature and

purpose of that control is primarily educational rather than economic. As a result, application of the common law test in this context would simply lead to an unreliable and unworkable conclusion.

The Supreme Court has also made it clear that the common law agency test should not be used where doing so would "thwart the congressional design or lead to absurd results." *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 323 (1992). A wooden application of the common law right of control test as a binary choice does precisely that. When examining the right of control in the real world, there are not only two choices. The right of control is a continuum. The greater degree of control exercised by schools over *all* students actually proves that the relationship is quite different, and in many respects more important than that of employer-employee; it is the relationship of university-student.

Employers generally do not attempt to control the personal lives of their employees because such engagement is beyond the scope of that relationship. Colleges and universities on the other hand immerse themselves in the lives of their students because they have an interest in - indeed a commitment to – their care and development. These various forms of support (such as resident hall oversight and counseling) are core to the universities' role and prove that the relationship is university-student because they are completely unlike the limited and unobtrusive control exercised by employers in the private affairs of their employees.

b. The Board should apply the test articulated in *Brown* and conclude that grant-in-aid scholarship football players are not "employees" within the meaning of Section 2(3) of the Act.

There is absolutely no reasoned justification for the Board to modify or overrule its decision in *Brown*. In *Brown*, the Board emphasized that the National Labor Relations Act was intended to cover only economic relationships. The Board held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees

within the meaning of Section 2(3) of the National Labor Relations Act, because they "have a primarily educational, not economic, relationship with their university." 342 NLRB at 488. Nothing has changed. The important national labor and educational policies that formed the basis for the Board's decision in *Brown* are just as applicable today as they were in 2004 when *Brown* was decided.

In *E.I. DuPont de Nemours and Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012), the U.S. Court of Appeals for the D.C. Circuit reiterated that decisions of the Board that deviate from Board precedent will not be enforced unless there is a "reasoned justification" for such a deviation. There is no reasoned justification for deviating from nearly forty years of established precedent.

The argument against employment status is even more compelling in this case because in *Brown*, the "work" performed by teaching assistants was a part of an educational service provided by the University to its undergraduates – teaching.[7] Here, the scholarship student-athletes are not coaching or teaching other students, they are participating in a voluntary activity established for them. Playing sports may not be a requirement for a degree, but it is still an activity established and operated for the student's overall education.

4. A scholarship is financial aid, not remuneration for services rendered.

Currently more than $2.7 billion is awarded in athletic scholarships yearly to men and women in NCAA member schools. For many students, athletic scholarships are the only way they can afford a college education and experience the many opportunities that flow from having a degree. As the many courts addressing this issue have ruled, these scholarships are financial

[7] As part of its reasoning, the Board cited to *St. Clare's Hospital*, 229 NLRB 1000, 1002 (1977) for the proposition that "since the individuals are rendering services which are directly related to—and indeed constitute an integral part of – their educational program, they are serving primarily as students and not primarily as employees." 342 NLRB at 489.

aid, not employee compensation.

The mere fact that scholarships are conditional does not mean they are not financial aid, and certainly does not mean that they are compensation for employment services rendered. The Massachusetts Supreme Judicial Court explained the rationale for this position well:

> Nor does a scholarship student "work for" the school in exchange for that scholarship. The benefits that may accrue to a school from the attendance of particularly talented athletes is conceptually no different from the benefits that schools obtain from the attendance of other forms of talented and successful students -- both as undergraduates and later as alumni, such students enhance the school's reputation, draw favorable attention to the school, and may increase the school's ability to raise funds. A school recruits and provides financial aid to students that it thinks will be good for the school in some respect, and the fact that a particular recruited scholarship student may provide the expected benefit to the school does not affect the nature of the school's legal relationship with the student. Again, scholarship or financial aid notwithstanding, neither side understands the relationship to be that of employer-employee or principal-agent.

Kavanagh, 440 Mass. at 199-200.

Another indication that the provision of an athletic scholarship is not indicative of employment status is the fact that colleges and universities could avoid such a finding by simply providing no scholarships. Employers cannot do this. A company cannot convert employees who perform services on behalf of a company into non-employees by simply not paying them. Laws require them to be paid.

Scholarship student-athletes are not employees who are paid to play a sport. They are students who voluntarily participate in wonderful opportunities. *See Equity in Ath., Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 681 (W.D. Va. 2009) ("participation in intercollegiate athletics is not a property right, but [instead] a privilege not protected by Constitutional due process safeguards"); *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981) (no right under the Constitution nor under the laws of Arizona to maintain a position on the college football team); *Colo. Seminary v. Nat'l Collegiate Athletic Ass'n*, 570 F.2d 320, 321 (10th Cir.

1978) (affirming that "the interest of the student athletes in participating in intercollegiate sports was not constitutionally protected"); *Gardner v. Wansart*, 2006 U.S. Dist. LEXIS 69491, at *17 (S.D.N.Y.) (no due process claim since student-athlete was "not . . . entitled under state or other law to participate as a matter of right in college athletics").

The student-athlete's so called "remuneration" is completely unlike remuneration characteristics of an employment relationship. The scholarship amount is unrelated to quality or quantity of "work," seniority, years of service, manner of performance, productivity, or the success or failure of the enterprise. A football scholarship is financial aid, not compensation. This financial aid is no different from the aid provided to students based on factors unrelated to athletics, such as need or academic merit. As the Board said in *Brown*, "[w]e also emphasize that the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not 'consideration for work.' It is financial aid to a student." 342 NLRB at 488.

Universities provide scholarships to attract students with talents (athletes, scholars, debaters, actors, musicians), which serves to enhance the college experience for all students. They should all be viewed by the Board as students with talents that enrich campus life, not employees hired to do so. Student-athletes are the consumers, not the producers, of educational services.

B. PARTICIPATION IN COLLEGE ATHLETICS IS NOT EMPLOYMENT; IT IS A CRITICAL LEARNING COMPONENT OF THE STUDENT'S EDUCATIONAL EXPERIENCE.

Speeches and articles from former student-athletes, who have gone on to have tremendous careers, frequently attest to the life-altering, character-developing, educational experience of their lives as student-athletes. The Provost at Oklahoma State articulated this concept well in a recent article. His remarks are particularly poignant because he is the chief

academic officer at a major university. He wrote:

> College education produces tomorrow's leaders - people who make a positive, meaningful, and enduring difference to the world. ...We might then ask, "What leadership characteristics are important for an undergraduate education to develop?" These might include traits and skills such as strategic and tactical planning, persistence, sensible risk-taking, resilience, self-discipline, time management, a sense of fairness, teamwork, an understanding of one's adversaries, and sportsmanship (being both a good winner and a good loser). If we now consider which characteristics competitive athletics help develop, the lists would track pretty well. That is, done right, participation in competitive athletics is leadership development. ...Students can learn as many lessons about leadership and life from a great coach as they can from any great professor. ...Nonetheless, competitive athletics can complement other aspects of college life in developing valuable skills as well as attitudes of leadership.

John Sternberg, *College Athletics: Necessary, Not Just Nice To Have,* Nacubo Business Officer Magazine, Sept. 1, 2011.

Participation in college sports is an essential component of a student's educational experience and training, not separate from it. Former student-athletes across the country have regularly cited their coaches as the single most influential person in their development as a person after their parents.

C. COLLECTIVE BARGAINING AND THE NLRA PRESENT AN INAPPROPRIATE FRAMEWORK TO ADDRESS STUDENT-ATHLETE MATTERS.

1. University leaders and the NCAA agree that students should have a greater voice, but the NLRA model is the wrong model for such discussions, as the adversarial collective bargaining model conflicts with the critical mentoring relationships found in colleges and universities.

In *Brown*, the Board recognized that imposing collective bargaining on the academic relationship between Brown and its graduate student assistants would have a "deleterious impact" on the educational decisions made by Brown's faculty and administrators. *Brown, supra*, 342 NLRB at 490. Specifically, collective bargaining would intrude upon educational issues that should be left to the discretion of Brown's faculty and administrators. *Id.*

As recognized by the Board in *Brown*, a significant danger of characterizing student-athletes as statutory employees under the Act is that purely academic decisions could become the subject of collective bargaining. *Id.* at 490-491. These types of decisions are exactly the types of decisions that academic leaders and faculty members must have the discretion to make without being constrained by the provisions of a collective bargaining agreement. This Board properly determined in *Brown* that "collective bargaining is not particularly well suited to educational decision making and ... any change in emphasis from quality education to economic concerns will prove detrimental to both labor and educational policies." *Id* at 489, citing *St. Clare's Hospital*, 229 NLRB 1000 (1977).

A similar problem would exist with respect to decisions on the role of athletics at a university. Collective bargaining would intrude on questions such as the amount of financial aid, whether students could be suspended for poor academic performance, whether playing time is at the discretion of the coach, whether students are spending too much or too little time on their athletic activities, whether scholarship students will enjoy a priority over walk-ons, whether the school will remain in an organization that prohibits professionals. These are ultimately decisions for the educational leaders to determine.

The Supreme Court recognized in *Yeshiva* that higher education is unique. The Court explained that "the 'business' of a university is education, and its vitality ultimately must depend upon academic policies that largely are formulated and generally are implemented by faculty governance decisions." 444 U.S. 672, 688 (1980). The Court further noted that "[t]he Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry ... in contrast, authority in the typical 'mature' private university is divided between a central administration and one or more collegial bodies." *Id.* at

680.[8]

Colleges and universities are renowned for their use of shared governance mechanisms, designed to ensure that all constituencies have a voice on appropriate issues. Student councils, university committees, task forces, study groups, focus groups, and student-athlete advisory committees all work extremely well in higher education because of their inclusive nature, openness and sensitivity.

Many of those outside of higher education fail to appreciate, or even to respect the unique ways in which our colleges and universities govern themselves. But this system of governance, unusual as it is, has created the most amazing system of education in the world, of which athletics is a part. The NLRA was enacted to create mechanisms to address industrial strife and obstructions to commerce. The relationship between scholarship student-athletes and their colleges and universities is nurturing, not adversarial. It is a culture of opportunity, not a culture of disruptions and strife.

Part of the uniqueness of the American system of higher education is that athletics is totally and intentionally integrated into the life and programs of our colleges and universities. This approach stands in stark contrast to the competition models used in Europe and other countries where separate semi-professional entities use paid professionals to compete against other paid professionals. In America, athletics programs exist because of the educational policies established by our leaders in higher education.

As the Board recognized in *Brown,* collective bargaining models are statutorily mandated to address an imbalance of power between potential adversaries with conflicting interests.

[8] It is also instructive to consider the wise counsel of the Seventh Circuit Court of Appeals in *NLRB v. Lewis University,* 765 F.2d 616 (7th Cir.1985). The court urged the NLRB to "exercise caution in applying the managerial analysis so as not to interfere with or upset the delicate balance of a college's governing structure" adding, "[i]t is only through this collegial decision making process that the university is able to effectively promote academic excellence, attract outstanding students, recruit and maintain a qualified faculty, and safeguard academic freedoms, all within the bounds of its financial resources."

Universities and students are not adversaries with conflicting interests; their interests are fundamentally aligned. *Brown,* 342 NLRB at 489. When there is a disagreement, the debate should always be about what is best for the student's education and development. The collective bargaining model is a brinksmanship model predicated on the use of economic weapons to maintain a balance of power. It is irrelevant to, and inappropriate for, students. Coaches and professors must be permitted to deal directly with students to guide, teach and mentor them. Declaring that students are employees subjects them to a unionization model of governance that was designed for industrial settings, not learning environments. The rules and requirements of the NLRA are wholly inappropriate here – they were never contemplated for student-athletes.

When parents take the long, quiet ride home after saying goodbye the first semester, they want to feel confident that the college or university is working diligently to create the most rewarding educational experience possible. This feeling is as true for the parents of a student-athlete as parents of any other student. University leaders have determined that converting student-athletes into paid professionals – injecting a different structure and a different set of motivations for attending college – would destroy their ability to provide a rewarding educational experience for these students and their classmates. It would undermine the efforts of universities to ensure that athletics plays an appropriate role in the overall educational development of students.

2. <u>There is no appropriate bargaining unit that can be applied to college athletics.</u>

The NLRA model is also inappropriate in this case because one of the requirements cannot be met: the identification of an appropriate bargaining unit. Excluding walk-ons from a bargaining unit makes no sense from a fairness perspective, yet they cannot be included due to the Regional Director's incorrect determination, essential to his employment analysis, that an athletic scholarship is compensation. Walk-ons share a total community of interest in all aspects

of their educational and athletic activities with scholarship student-athletes.

Under the model advanced by the Regional Director, an offensive guard who is on a scholarship would technically not be the co-employee of his teammate, an offensive tackle who is not on scholarship. They are teammates and classmates, but not co-workers under the Regional Director's decision. They might be blocking the same defender, but have a different "employment status" and different rights of representation. This absurd result highlights the deficiencies in the Regional Director's logic and proves the point that student-athletes are not employees at all.

It is also wrong to isolate football student-athletes from those playing in other sports. They interact on the same campuses, go to the same classes and are subject to the same rules. Football student-athletes strive to become better athletes just like student-athletes involved with fencing, softball, volleyball, soccer, or the many other sports played in NCAA-sanctioned competition both by women and men.

3. The rules governing mandatory subjects of bargaining cannot reasonably be applied to collegiate athletics.

The natural concessions that would be required through the collective bargaining process could fundamentally affect critical educational and academic policy decisions, which underscore the inappropriateness of collective bargaining to the student-athlete context. Colleges and universities have many rules and policies with which undergraduates must comply – both on and off the field. These rules and policies are critical to maintaining a safe and supportive educational environment.

Must a university bargain with a union over drug testing procedures if it is concerned about student-athletes using performance enhancing substances? Must a university bargain over whether players can be suspended for not maintaining a satisfactory grade point average? Must a university bargain over reasonable rules governing behavior required of all undergraduates?

Should coaches be required to bargain over whether the offensive line will be selected by seniority? Can a player be benched for skipping practice without risking arbitration over whether the benching was for just cause? Must a university bargain over whether a student can be suspended for drug use or underage drinking? Must a university bargain with a union over whether the school should leave the NCAA so that it can professionalize its players? Should members of the team have the legal right to strike if they are unhappy about the resolution of any of these issues? What does that do to the overall educational environment?

It is not sufficient to simply declare confidence that the parties will be able to work out such issues through bargaining. University leaders have the right, indeed the responsibility, to make these determinations with appropriate input from campus constituencies. They must be allowed to do so in a collaborative, shared governance model, consistent with how universities traditionally operate, without being statutorily required to negotiate compromises with an adverse union party standing between them and the students.

Additionally, since the NCAA is made up of both public and private institutions located in every state in the country, there is the potential for serious disruption and inconsistencies in intercollegiate athletics. If the NLRB declares scholarship student-athletes to be employees, that decision could only have an impact on scholarship student-athletes at private institutions and will create a conflict with the hundreds of public institutions in states where no such declaration has been made, or will be made. The legality of collectively bargaining for public "employees" varies from state to state. Indeed, in several states, such as North Carolina, collective bargaining is not permitted pursuant to state law. The State of Ohio recently enacted legislation explicitly stating that a student attending a state university is not an employee of the university based upon

the student's participation in an athletic program offered by the university.[9] The terms and conditions over which employees can bargain also vary greatly between public and private institutions, and between public institutions in different states. The inevitable imbalance that would result from the Regional Director's decision would severely impact the NCAA's ability, as a voluntary association, to effectively facilitate intercollegiate athletics according to its core values.

Collective bargaining in this context would cause real disruption to what is, and should be, a voluntary decision on the part of schools to be members of an organization that establishes rules to which all agree are in the interests of fair competition and educational integrity.

Some suggest the potential problems posed by collective bargaining can be avoided by the parties simply agreeing to refrain from bargaining over proposals that would violate NCAA rules or impede educational policymaking. In its post-hearing brief, CAPA suggested that its current bargaining objectives are limited and that it will not seek to jeopardize amateur status. Brief at p. 7. The NLRB should not grant labor organizations a broad spectrum of rights that will impact educational policy on the faith that they will have the judgment or restraint not to exercise them. The NLRA statutory scheme is not grounded on hopes of future forbearance. It is grounded on the understanding that the Act grants parties the power to use economic weapons to force concessions on wages, hours and working conditions. These concessions could affect fundamental educational and academic policy decisions and should not be risked. As the Board said in *Brown*,

> there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational

[9] Ohio HB 483, signed into law by Gov. John Kasich on June 16, 2014, states, "Sec. 3345.56. Notwithstanding any provision of the Revised Code to the contrary, a student attending a state university as defined in section 3345.011 of the Revised Code is not an employee of the state university based upon the student's participation in an athletic program offered by the state university."

> process. Although the dissent dismisses our concerns about collective bargaining and academic freedom at private universities as pure speculation, their confidence in the process in turn relies on speculation about the risks of imposing collective bargaining on the student-university relationship. We decline to take these risks with our nation's excellent private educational system.

342 NLRB at 493. This Board should similarly not take risks with this extremely important component of our excellent private educational system.

D. ACADEMIC LEADERS, NOT THE NLRB, SHOULD DECIDE THE ROLE OF INTERCOLLEGIATE ATHLETICS AT OUR COLLEGES AND UNIVERSITIES.

1. University leaders are entrusted with the responsibility of determining the role of athletics within their educational programs and should not have to risk bargaining over the role of athletics or the priorities assigned to it.

Although there is ample debate in the United States regarding the role of athletics in higher education, that is a decision to be left to academic leaders, not the NLRB or labor organizations. The nation's superb system of higher education, which includes other associations governing athletics in non-NCAA schools such as the National Association of Intercollegiate Athletics (NAIA) (about 300 schools) and the National Junior College Athletic Association (NJCAA) (about 436 schools), demands that academic leaders exercise their sound and reasonable judgment on educational priorities after appropriate internal consultation, without being second-guessed by courts, boards, unions and other third parties. The priorities are, and always must be, about education.

This does not mean that scholarship student-athletes do not have a voice, because they do. Whether it is individually, through student-athlete committees or via other mechanisms for communication, the interests of student-athletes are robustly presented and debated inside our colleges and universities and at the NCAA. However, for the reasons articulated in Section C above, as well as by the Board in its well-reasoned decision in *Brown*, collective bargaining is not the proper model to address these issues. *Id.* at 488-90.

The academic policy leaders at our universities also have a fundamental right and obligation to determine whether to offer sports scholarships. Under the Regional Director's decision, CAPA would not represent students who do not receive a scholarship, nor could CAPA demand that Northwestern provide scholarships to those football student-athletes. *Yeshiva* recognized that collective bargaining should not interfere with the process of setting educational policies. And if that is true with respect to the interests of faculty, it is doubly true with respect to the interests of students because those policies are established for the benefit of the students. Unions should not be able to interfere with the process of setting educational policies applicable to students.

E. AMATEURISM IS A NECESSITY FOR COLLEGE SPORTS AND EDUCATIONAL POLICY.

Our educational leaders have arrived at the considered decision that student-athletes must remain amateurs to ensure that athletics remains an activity for their educational development, rather than a professional activity that would present distractions from the student's overall development. Maintaining this model is crucial to preserving an environment where participation in sports is properly integrated into the total educational program and plays an appropriate role in relation to the students' academic development. The NCAA, along with the academic leaders of its member institutions believe that abandoning the amateur college sports model would be contrary to the developmental and educational purposes of having students participate in college sports.[10] Therefore, NCAA amateurism rules provide incentives for

[10] The Association's Constitution outlines the basic principle that "student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA Constitution, Section 2.9. Therefore, NCAA amateurism rules provide incentives for compliance and penalties for violations of amateurism standards. NCAA By-Laws, Article 12.

compliance and penalties for violations of amateurism standards.[11]

Courts have supported the NCAA's vigilance in ensuring that college sports retains its amateur status. *See Smith v. NCAA*, 139 F.3d 180, 182, 185-87 (3d Cir. 1998) (upholding rule that barred participation by graduate student who had been an undergraduate at a different school); *Banks v. NCAA*, 977 F.2d 1081, 1083-84, 1094 (7th Cir. 1992) (upholding rules that revoked a football player's eligibility to participate in the sport after he signed with an agent and participated in the NFL draft); *McCormack v. NCAA*, 845 F.2d 1338, 1340, 1343-45 (5th Cir. 1988) (upholding rules that limited compensation for football players to scholarships with limited financial benefits); *Hennessey v. NCAA*, 564 F.2d 1136, 1151-54 (5th Cir. 1977) (upholding a rule limiting the number of assistant football and basketball coaches Division I schools could employ); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 465, 497 (D.N.J. 1998) (upholding a rule that set minimum academic standards for participation); *Gaines v. NCAA*, 746 F. Supp. 738, 740-41 (M.D. Tenn. 1990) (upholding rules that revoked an student-athlete's eligibility to participate in an intercollegiate sport after the athlete entered the draft and engaged an agent); *Justice v. NCAA*, 577 F. Supp. 356, 360, 375, 383-84 (D. Ariz. 1983) (upholding a rule that denied a student-athlete's eligibility to participate in a sport after the student-athlete accepted pay for participation in the sport); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 343 (7th Cir. 2012) (noting that eligibility rules are clearly necessary to preserve amateurism and the student-athlete in college because they define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of the college sports).

[11] Amateurism in college sports is a uniquely American concept that focuses on overall educational development rather than preparation for careers as professional athletes. To be sure, some highly gifted student-athletes progress to professional athletic careers. Yet, fewer than two percent of student-athletes in all sports will ever play professionally. This highlights the importance of NCAA rules designed to preserve the educational purpose of college sports. The vast majority of the time, NCAA schools are preparing their student-athletes to "go pro" in something other than sports.

Critics say that if colleges wish to preserve amateurism in college sports, they can simply end scholarships. In this environment where educational debt is a reported $1.2 trillion,[12] the potential of the elimination of $2.7 billion per year in direct scholarships for the young people in our country certainly does not seem like the right result. University leaders use scholarships to provide an education to students who simply would not be able to afford an education without them. They use scholarships to bring a richness and vibrancy to university life that is critical to the educational development of all students. They do so to promote diversity. Indeed, studies have shown that the NCAA athletic scholarship program is one of the greatest providers of access to education to minority and low income students. As a result of this access to education, their income is likely going to be higher than it otherwise would have been. They use scholarships to promote leadership and develop life skills. Without scholarships, only students with adequate financial resources or other financial aid opportunities would be able to attend college and participate in intercollegiate athletics.

F. PROFOUNDLY NEGATIVE CONSEQUENCES WILL RESULT FROM GRANTING EMPLOYMENT STATUS TO STUDENT-ATHLETES.

The Board's Notice and Invitation to File Briefs asks what the policy implications would be if grant-in-aid scholarship football players were determined to be employees under the Act. There are numerous negative ramifications that would flow from a finding that scholarship student-athletes are employees under the Act. It would conflict with important social and economic policies administered by the government, such as Title IX, and it would be inconsistent with important values supported by the legislatures, courts and society at large.

1. The world of intercollegiate athletics as we know it could shrink because of a lack of resources.

[12] The Consumer Financial Protection Bureau estimated that outstanding debt approached $1.2 trillion as of May 2013. http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion/

Last year, of the approximately 1,100 colleges and universities in Division I, Division II and Division III, only about 25 athletic departments had greater revenues than expenses. This year, that number decreased to 20. Virtually all of the schools invest resources into athletics because university leaders view athletics as an educational priority. There is grave concern that if student-athletes become unionized employees, resources devoted to intercollegiate athletics will shrink. As one athletic conference commissioner stated,

> [B]ecause the "revenue" sports at most universities support the "non-revenue" sports – including sports such as baseball, soccer, softball, volleyball, swimming, and tennis – the entire world of intercollegiate athletics as we know it could shrink dramatically because of a lack of resources. Women's sports could be hit particularly hard, which would be a real travesty given all that we have achieved over the last 40 years since the advent of Title IX... With this demise would come the loss of opportunity for thousands of students who, without athletic scholarships, might never be able to attend college.

Larry Scott, *Wrong Prescription for College Sports*, USA Today, April 5, 2014.

Similarly, there is concern that unionizing student-athletes may reduce contributions from alumni, university supporters and the general student population. As Baylor University President and Chancellor Ken Starr recently noted in testimony before Congress,

> [I]t is reasonable to believe that donors' gifts to collegiate athletics may decline as student-athletes are legally redefined as university "employees" ... Any significant decline in donor support has the unfortunate potential to trigger a downward spiral as to an athletic department's ability to support a full range of teams and athletic activities... [S]tudent fees could well become a source of division (or at least friction) if students perceive they are paying to provide athletes with enhanced (employment-based) benefits not available to the general student body.

Judge Ken Starr, *Witness Statement*, House Committee on Education and Labor Hearing on Big Labor on College Campuses – Examining the Consequences of Unionizing Student-Athletes, May 8, 2014. Permitting student-athletes to become professionals will create a structural chasm in the student body. Instead of unifying a campus, it will fracture it. Instead of fostering community, it will promote a culture of haves and have nots. Seats formerly occupied by

students with school colors painted on their faces will be empty.

2. Declaring scholarship athletes to be employees inappropriately forces universities and athletes to participate in an altered environment.

When employers hire an employee, they know that they are voluntarily undertaking the rights, risks, responsibilities and restrictions that come with being an employer. For the over 60 years that NCAA colleges and universities have been providing scholarships to student-athletes, it has been with a global understanding that they were not establishing an employment relationship in the process. Whatever obligations may flow from the provision of athletic scholarships, it has never been with an understanding that colleges were converting students into employees. The NLRB should not issue a decision that effectively declares that the practice of treating scholarship student-athletes as non-employees for more than seven decades was simply wrong. The Regional Director's decision seeks drastic and unnecessary changes to a system of education and way of life that has benefited millions of Americans.

Likewise, when individuals choose to attend a school and participate in college athletics, they do so knowing that they will be students engaged in a voluntary activity and not entering into an employer-employee relationship with the institution. The students and their families do not want an employment relationship; they want an educational experience – one that involves academics and sports – a superb preparation for life after college.

3. Upholding the Regional Director's decision will conflict with other important statutory goals and rights, even if collective bargaining is precluded as is the case with confidential employees.

The Board's Notice and Invitation to File Briefs appears to acknowledge that if unions were permitted to insist on bargaining on the full range of mandatory subjects available under the Act, that member schools would be placed in the impossible position of either refusing to bargain on a mandatory subject, or engaging in discussions that could lead to an agreement that would violate NCAA rules. Indeed, benefits provided as a result of collective bargaining could result in

students becoming ineligible to compete in their NCAA sport because they are contrary to NCAA rules. Although the proper resolution of this problem is to not grant students the right to collectively bargain, it does not follow that they should nevertheless be deemed employees, but simply without the right to bargain.

Declaring scholarship student-athletes to be employees under the Act, even without bargaining rights, would create a conflict with important policies mandated or sanctioned by Congress. Colleges and universities have promulgated rules designed to foster a safe, supportive and creative learning environment. These rules would have to be modified or abandoned to fit an employee model, rather than a student model. Universities would have to modify their rules on issues such as property access, social media, confidentiality during sexual harassment investigations, tenets of community behavior and academic freedom, just to name a few.[13] Accordingly, even if students have no bargaining representative, either because they vote no, or as a matter of Board policy, declaring scholarship student-athletes to be employees forces universities to abandon rules that were specifically tailored for an educational environment. It is an assault on academic freedom and the ability of the Universities to set educational policy.

4. Declaring that scholarship student-athletes at Northwestern are employees might make student athletics committees across the nation unlawful under *Electromation*, thereby actually decreasing the options available for students to have a greater voice at their schools.

The Regional Director's decision could have the additional significantly adverse effect of requiring all private schools offering scholarships to dissolve university-sponsored student-athlete committees. As discussed above, many of these schools have established student-athlete advisory committees to enhance communications between student-athletes and the

[13] *See Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012) (confidentiality during investigations); *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011) (off-duty access rights); *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (social media); *Plaza Auto Center, Inc. and Nick Aguirre*, 360 NLRB No. 117 (2014) (profanity).

administration. If the Regional Director's decision is affirmed, these committees might be unlawful under the Board's decision in *Electromation Inc.*, 309 NLRB No. 163 (1992). Students and universities in America would be shocked to learn that a Regional Director's decision in Chicago could trigger the dissolution of student-athlete committees nationwide that have functioned well for decades. Students also would be concerned to learn that the NLRA model of union representation would be the only representation model available to them to deal with their institutions on issues like health care, expenses and player safety. Declaring students to be employees actually decreases their options for how to have a greater voice in a university setting.

5. Affirming the Regional Director's decision will reduce opportunities for future students.

Finally, and most importantly, there is the issue of opportunity. Currently more than $2.7 billion is awarded in athletic scholarships yearly to men and women attending NCAA member colleges and universities. For many students, athletic scholarships are the only way they can afford a college education. Just shy of 20 percent of all student-athletes are first-generation college students, and a similar number report that they would not have gone to college at all, if not for athletics. These scholarships lead to opportunities that they might otherwise never experience. A decision that would result in less academic opportunity for students across the country is simply untenable. The Board, therefore, should not trigger a reconsideration of such policies.

III. CONCLUSION

There are currently more than 126,000 NCAA student-athletes in America receiving athletic scholarships. The overwhelming number of them will never become professional athletes; they participate in intercollegiate sports because of the remarkable experience and education that their participation provides. They are not employees. They have never been employees. It is not the law. It has never been the law.

It is not in the best interests of our students, our colleges and universities, our system of education, or the country for the Board to ignore a firmly established treasured understanding. Scholarship student-athletes are not employees, they are students – exclusively – first, last and foremost.

Date: July 3, 2014

Respectfully submitted,

/s/ Donald S. Prophete
Donald S. Prophete
Walter C. Hunter
JP Kernisan
Amber Hodgson

LITTLER MENDELSON, P.C.
A Professional Corporation
1201 Walnut Street
Suite 1450
Kansas City, MO 64106

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2014, a true and correct copy of the foregoing was electronically filed with the National Labor Relations Board and was served via email, upon:

John G. Adam
Legghio & Israel, P.C.
306 South Washington, Suite 600
Roayl Oak, MI 48067
jga@leggioisrael.com

W. Gary Kohlman
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, NW
Washington, DC 20005
gkohlman@redhoff.com

Stephen A. Yokich
Cornfield and Feldman
25 East Washington Street, Suite 1400
Chicago, IL 60602
syokich@cornfieldandFeldman.com

Counsel for Petitioner

Alex V. Barbour
Joseph E. Tilson
Anna Wemuth
Jeremy Glenn
Meckler Bulger Tilson Marisk & Pearson, LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
Alex.barour@mbtlaw.com
Anna.wermuth@mbtlaw.com
Jeremy.glenn@mbtlaw.com

Counsel for Employer

Peter Ohr
Regional Director, Region 13
The Rookery Building
209 South LaSalle Street
Suite 900
Chicago, IL 60604-5208
NLRBRegion13@nlrb.gov

/s/ Walter C. Hunter